UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

YP MIDWEST PUBLISHING, LLC d/b/a DEX YP **Respondent,** **and** **DISTRICT 4, COMMUNICATIONS WORKERS OF AMERICA (CWA), AFL-CIO** **Charging Party.**	**Case No. 07-CA-218455**

CHARGING PARTY'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Pursuant to Section §102.46 of the Board's Rules and Regulations, Charging Party (hereinafter "CP" or "Union" or "CWA") hereby submits its Brief in Support of Exceptions to the June 18, 2020 Decision and Order ("Decision") of Administrative Law Judge Melissa M. Olivero.

Date: August 17, 2020

Respectfully submitted,

s/ *Matthew R. Harris*

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I. STATEMENT OF THE CASE

The CP and Respondent (and its predecessors) have maintained a collective bargaining relationship for many years. In September of 2016, CP entered into a successor collective bargaining agreement ("CBA") with YP Midwest Publishing ("YP" or "Respondent"). YP representative and attorney Keith Halpern ("Halpern") led negotiations of the CBA on behalf of YP. CWA District 4 Administrative Director Teri Pluta ("Pluta") led negotiations of the CBA on behalf of the Union. At the bargaining table, the Parties agreed to the following language: "The Company agrees to acknowledge the provision of a 401(k) benefit to bargaining union [sic.] employees in the drafting of the collective bargaining agreement." (R2, p. 20)

Sometime thereafter, Halpern left employment with YP. He was replaced by Senior Assistant General Counsel Brian Herman ("Herman")[1]. In the initial draft from Herman to Pluta, the CBA contained the following language:

> The Company 401K matching rate for all bargaining unit employees will be no less than 100% for each employee dollar contributed to individual accounts up to 5% maximum contribution. If during the term of the Agreement, the Company maximum contribution % is increased for non-represented, non bargained employees, the % shall also be increased for bargained employees. (ALJD 8:17-18; GC 2, p. 133; GC 10-11).

Herman and Steven Flager ("Flagler"), at the time YP attorney and Senior Manager of Labor and Employee Relations, reviewed the CBA on behalf of YP, sending several drafts back and forth with Pluta. Each draft contained the same 401(K) language highlighted above. (ALJD 8:17-18; GC 10-11; GC2)

After several months of review, the Parties memorialized their final agreement. (GC2) The final agreement included the following provision:

[1] Neither Halpern (the individual responsible for negotiating the CBA) nor Herman (the individual responsible for the initial draft of the CBA) were called as witnesses by Respondent.

> The Company 401K matching rate for all bargaining unit employees will be no less than 100% for each employee dollar contributed to individual accounts up to 5% maximum contribution. If during the term of the Agreement, the Company maximum contribution % is increased for non-represented, non bargained employees, the % shall also be increased for bargained employees.

(GC2, p. 133; GC10-11). The CBA was effective from August 14, 2016 through August 10, 2019.

On June 30, 2017, Dex Media Holdings ("Dex") acquired YP. The resultant entity, Respondent, began doing business as "Dex-YP." At all times, Respondent recognized CWA as the exclusive bargaining representative for all employees in the bargaining unit. (GC3) At all times, Respondent recognized and adopted the CBA entered into between CWA and YP. (*Id*.)

In October of 2017, CWA Staff Representative Shannon Kirkland's ("Kirkland") assignment included oversight of the Dex-YP bargaining unit. On October 19, 2017, Kirkland, who was present during some CBA negotiations, inquired about whether Respondent was acting in accordance with the 401(k) provision contained in the CBA. (GC4) Specifically, Kirkland emailed Respondent's Assistant Vice President of Labor Relations, Beth Dickson, inquiring about the current 401(k) match rates. (*Id*.) Dickson responded by email that same day, stating, "I believe [Flagler] is planning to reach out to you to preview 2018 benefits including 401(k). I think you will be pleased with these plans." (*Id*.) No further clarification was provided.

On October 20, 2017, Flagler, now Respondent's legal counsel, sent an email to Pluta and Kirkland regarding the planned roll out of Respondent's 2018 benefit offerings for bargained-for employees. (R9) In that correspondence Flagler indicated the 401(k) offering, beginning January 1, 2018, would be as follows: "immediate eligibility for enrollment and match, 2 year cliff vesting | 100% match of first 3% deferred; 60% of next 3% (total 4.8% match)." (*Id*.) The same

correspondence included the following caveat: "Note: Portions may be overridden by specific 2018 CBA provisions." (*Id*.)

Flagler's email correspondence was discussed at a meeting between the Parties held on or about October 20, 2017. (TR 152) Present at this meeting were Pluta, Kirkland, Flagler and Dickson. (*Id*.) During that meeting the Union questioned the ability of the Company to make such a change in light of the contractual language to the contrary. (TR 152-53) Flagler committed to providing a response, but the Union never heard back from him. (TR 153)

Around the same time, Kirkland requested a copy of the benefit plan document. (TR 35) The Union did not receive any further information regarding the 401(k) until after a change had already been effectuated. More specifically, in March of 2018, Respondent, for the first time, forwarded a copy of the "DexYP Savings Plan" to Kirkland. (TR 35) It was at this time the Union was able to verify that the Company had not been adhering to the contractual 401(k) match. Further, without gaining the consent of the Union or even consulting the CBA, Respondent had already implemented the above changes to the 401(k) language, effective on or about January 1, 2018. (TR 67) The new Savings Plan implemented by Respondent included the following provision:

> **Section 3.03 Company-Matching Contributions**
>
> (a) . . . Company-Matching Contributions shall be as follows:
>
> > (1) Each Member shall be allocated a Safe Harbor Company-Matching Contribution equal to (i) 100% of the first 3% of Compensation such Member contributed to the Plan for that payroll period in the form of Elective Contributions, Designated Roth Contributions, After-Tax Contributions or combination thereof and (ii) 60% of the next 3% of Compensation such Member contributed to the Plan for that pay period in the form of Elective Contributions, Designated Roth Contributions, After-Tax Contributions or combinations thereof.[2]

[2] Not only did Respondent unilaterally change the match formula provided in the CBA, but Respondent also unilaterally changed the nature of the match to a graduated match. (TR 128)

(GC5, p. 15)

The Union filed a Charge on April 18, 2018. The matter proceeded to hearing on April 23, 2019. At hearing, over the objection of both the GC and CP, ALJ Melissa M. Olivero ("ALJ") admitted myriad parol evidence into the record offered by Respondent for the purpose of varying the language contained in the CBA. Relying upon this evidence, the ALJ issued her decision in this matter on June 18, 2020, finding the Respondent did not violate Sections 8(a)(1), 5 or 8(d) of the Act. ALJ Olivero dismissed the Complaint.

II. QUESTIONS PRESENTED

1. Whether the ALJ erred by considering and relying upon parol evidence (ALJD generally) (Exception 1);

2. Whether the ALJ erred in concluding that the Respondent failed to continue in effect all terms and conditions of the collective bargaining agreement (GC2) by unilaterally changing its 401(k) contribution formula in violation of Sections 8(a)(5) and (1) of the Act (Exceptions 2-9); and

3. Whether the ALJ erred in concluding that the Respondent failed to continue in effect all terms and conditions of the collective bargaining agreement (GC2) by unilaterally changing its 401(k) contribution formula in violation of Section 8(d). (Exceptions 2-8, 10)

III. LAW AND ARGUMENT

A. *The ALJ Erred by Admitting and Relying Upon Parol Evidence. (Exception 1)*

Over the objection of both the GC and CP, the ALJ admitted numerous documents offered by Respondent for purposes of varying the language memorialized in the CBA. In admitting and considering parol evidence, the ALJ relied primarily upon the Board's decision in *Apache Powder Co.*, 223 NLRB 191, 194 (1976). In *Apache Powder*, the Board affirmed the decision of the ALJ, wherein the ALJ concluded that the Respondent's refusal to execute a final CBA was

not unlawful insofar as the respondent mistakenly included an erroneous pension break date[3] into the CBA that "was so obvious so as to have placed a person of reasonable intelligence on guard." *Id*. at 195. The Board approved the admission of parol evidence for the purposes of demonstrating a unilateral mistake "so obvious as to put the other party on notice of an error." *Id*. at 191.

Here, the ALJ's reliance upon *Apache Powder* was misplaced as this case does not involve an open and obvious unilateral mistake. Rather, *Windward Teachers Association*, 346 NLRB 1148 (2006), cited in CP's Post-Hearing Brief, is the more analogous case.

In *Windward*, after several bargaining sessions the parties memorialized their understandings in a "Stipulation of Agreement." *Id*. at 1149. The language at issue was recorded in the Stipulation of Agreement as follows: "A new Paragraph K shall be added which shall read as follows: 'The School has the right to pay bonuses without Union approval.'" *Id*. The parties discussed the final Stipulation on several occasions over the course of several weeks. *Id*. The respondent did not object to the language during the course of these exchanges. *Id*. The agreement was ultimately submitted to respondent for final signature. *Id*. The respondent ultimately refused to sign the finalized agreement, which included the foregoing bonus provision, claiming it did not agree to the bonus language as written. *Id*.

In overturning the ALJ's decision the Board found that the respondent's refusal to sign the final contract was a violation of the Act:

> Respondent reviewed several versions of the contract without objecting to the terms of the bonus clause . . . The Respondent thereby consented to the integration of that language into the complete agreement . . . Even assuming that the Respondent made a bona fide mistake in failing to object to the bonus clause as written, its mistake was not so obvious as to put the School on notice that Respondent's clearly manifested assent was made in error.

[3] The parties in *Apache Powder* mistakenly included a pension break date of "January 5, 1972" instead of "January 5, 1973." The employer-respondent refused to sign the final agreement containing the "January 5, 1972" date.

Id. 1151-52; *accord Ebon Services*, 298 NLRB 219, 223 (1990) (respondent bound by terms of CBA where representative "read over page by page the Union's proposed contract and agreed to sign it.").

Here, much like the respondent in *Windward*, Respondent committed that it would "acknowledge the provision of a 401(k) benefit to bargaining union [sic.] employees in the drafting of the collective bargaining agreement." (R2, p. 20) Respondent then drafted a copy of the proposed CBA and submitted it to the Union; this draft included the 401(k) provision at issue. (ALJD 8:17-18; GC7, p. 138; TR 143) Each respective draft from there onward included the language at issue. Irrespective of drafting the language at issue, Respondent also had several employee-attorneys review the final CBA, containing the 401(k) language at issue. All of these attorneys allegedly "missed" the 401(k) language over the course of several months, according to Flagler's testimony. (TR 115)

Further, Pluta testified clearly and consistently that Respondent drafted and included the 401(k) language in the CBA. (TR 143, 148, 178) Flagler, after wavering, testified only that he could not recall who drafted the 401(k) language contained in the CBA. (TR 111) At best, Respondent has demonstrated only that it committed a unilateral mistake. However, because Pluta and the Union had no reason to believe the inclusion of this language at the hand of the Employer was improper, Respondent cannot invoke the unilateral mistake exception to the parol evidence rule. (*see* fn. 3, *supra*) Accordingly, the ALJ erred in relying upon the Board's decision in *Apache Powder*, as the purported unilateral mistake cannot be said to have been so palpable as to have placed the CP on notice that a mistake had been made. Thus, parol evidence should not have been admitted, nor relied upon for this purpose.

Further, there was no other reason for the ALJ to have considered parol evidence to contradict the terms of the CBA.

> Generally considered to be a substantive rule of law dealing with the formation of contracts[, the parol evidence rule,] rather than an exclusionary rule of evidence, is as follows: Where the parties to a contract express their agreement in an integrated writing, intending it to embody the full and final expression of their bargain, any other expression, usually oral, made prior to or contemporaneous with the writing, is inadmissible to vary the terms of the writing. Obviously, there are strong similarities between Section 8(d) and the parol evidence rule, for Section 8(d) requires the parties to maintain the terms and conditions of employment which have been negotiated and which have, as a result of the negotiations, been reduced to writing . . . [A]n attempt to orally modify a fully integrated contract will not be permitted under the parol evidence rule and a deviation from those terms will be regarded as a breach of contract."

Kal Kan Foods, Inc., 288 NLRB 590, 593 (1988). Parol evidence is only admitted in the most extreme of circumstances, as there is a strong presumption that an agreement reduced to writing and signed by the parties is the final expression of each party's intent. Thus, the introduction of parol evidence is typically only considered where offered to: (1) clear up ambiguities; (2) demonstrate a mutual mistake, (3) demonstrate a unilateral mistake so palpable so as to have placed the other party on notice that a mistake had been made; (4) demonstrate past practices inconsistent with an expired agreement; (5) demonstrate fraud in the execution. *See*, *e.g*., §16-402.1 of the NLRB Division of Judges Bench Book (2019) and cases cited therein.

There is no ambiguity in the language it issue. It provides for a very specific 401(K) matching rate, "The Company 401K matching rate for all bargaining unit employees will be no less than 100% for each employee dollar contributed to individual accounts up to 5% maximum contribution." (GC2)

There is no evidence of a mutual mistake. In *Norris Industries*, 231 NLRB 50, 64 (1977), citing 66 Am. Jur.2d 512, "Reformation of Instruments," Section 23, the Board set forth the standard applied in matters involving an alleged mutual mistake:

> A mutual mistake, for which an instrument will be reformed, is one which is reciprocal and common to both parties, each alike laboring under the same misconception in respect to the terms of the written instrument. It is a mistake shared by both parties to the instrument at the time of reducing their agreement to writing and the mistake is mutual if the contract has been written in terms which violate the understanding of both parties -- that is, if it appears that both have done what neither intended…

Respondent produced absolutely no evidence that a mutual mistake was committed regarding the 401(k) provision at issue. First, the ALJ specifically found that the 401(K) language at issue was included in the very first draft of what became the final CBA, ***which was submitted to the Union by the Employer***: "This language appeared in both the redlined copy of the MOA sent by Herman to Pluta and the version sent by Pluta to Flagler." (ALJD 8:17-18) Second, The ALJ's finding in this respect comports with the evidence and Pluta's testimony. Pluta testified clearly and consistently about two primary issues: (1) The language at issue was drafted and inserted by the Respondent; and (2) She had no reason to believe the inclusion of the 401(k) provision was erroneous or in any way improper:

> I had no reason to believe it was incorrect. I had no reason at all. I believed that the employees were getting 5 percent and that's the way that YP memorialized it as we requested, was to actually put those amounts in the contract. There also was a further statement I did not ask for in the event that it goes higher. I didn't ask for that, and it's there.

(TR 178; *see also* TR 143, 148)[4]

Third, Respondent failed to call as a witness its lead negotiator, Halpern. Respondent also failed to call Herman, the party with the primary responsibility for partially drafting and finalizing the terms of the CBA with Pluta after Halpern's departure from Respondent. (GC8)

[4] Pluta's reasonable belief is supported by Flagler's testimony and the facts surrounding bargaining: Flagler admitted that, during bargaining, Halpern made a statement to the effect of "six percent would be over the 5 percent ***for everyone*** right now." (emphasis added) (TR 123) Flagler also testified that non-bargained for employees were receiving a 5% match at the time of bargaining. (TR 123) Hence, Pluta would have had no reason to believe the 5% match memorialized by Respondent in the CBA would have been in error.

Fourth, Flager was the only witness produced by Respondent. His testimony, at best, demonstrated only that he, along with Herman--both attorneys with special training in the drafting and review of contractual language--"missed" the entirety of the benefits provision containing the 401(k) language through several exchanged drafts of the CBA, through numerous back-and-forth emails and telephone calls with the Union, and after several months of review. (TR 104) Flagler's explanation for this (or lack thereof) was only that the 401(k) provision "should not have been in the contract" based on his "recollection of what happened at the bargaining table." (TR 104, 119-120)

Flagler's testimony in this respect should be given little credit: First, it constitutes parol evidence and should not be considered. Second, notwithstanding the parol evidence exclusion, (1) Flagler was not the primary negotiator on behalf of Respondent and had no authority to bind Respondent during bargaining (TR 115); (2) Halpern, the chief negotiator for Respondent, committed at the bargaining table to "acknowledge the provision of a 401(k) benefit to bargaining union [sic.] employees in the drafting of the collective bargaining agreement" (R2, p. 20); (3) Herman, not Flager, was primarily responsible for finalizing the CBA language and did so along with Pluta (TR 143).

Further, Flager first blamed the Union for including what he deemed to be erroneous 401(k) language in the CBA: "So this was written by Teri Pluta and was in – we later learned, in the version that she had sent us as – which purported to be the contract update with the terms from the MOA." (TR 95) However, after being confronted with a draft document of the CBA showing that he himself also affirmatively inserted the 401(k) language into a draft that would eventually be included in final CBA, Flagler waivered in his testimony, stating, "That is what the

document shows, though I still don't recall ever putting that into the draft of the contract." (GC9, p. 77, TR 109) Therefore, the mutual mistake exception to the parol evidence does not apply.

Finally, no other exception to the parol evidence rule was addressed by the ALJ, nor proffered by Respondent. The ALJ erred in considering and relying upon parol evidence.

B. *The ALJ Erred In Concluding That a Memorandum of Agreement That Preceded the Final CBA Was an Integrated Agreement That Superseded the Final CBA. (Exceptions 1-10)*

In reaching her conclusion that the Respondent did not violate the Act, the ALJ's decision rested heavily upon a Memorandum of Agreement reached at the bargaining table, which stated as follows: "The Company agrees to acknowledge the provision of a 401(k) benefit to bargaining union [sic.] employees in the drafting of the collective bargaining agreement." (R2, p. 20) The ALJ also relied upon bargaining proposals submitted by the Union early on in bargaining that respectively sought 6% and 5% 401(K) matches, both of which were rejected by the Employer. (ALJD 13:15-17) Based primarily upon these pieces of parol evidence, the ALJ concluded that the earlier MOA was an "integrated agreement" that memorialized the parties' agreement. (ALJD 15:20) The ALJ went on to conclude that the final signed CBA contained an erroneous expression of the Parties' agreement with respect to the 401(K). (ALJD 16:24-29)

First, with respect to the ALJ's reliance upon the earlier MOA, the MOA was clearly anything but a final expression of the parties' agreement with respect to the 401(K) matching arrangement. The language in the MOA provided: "The Company agrees to acknowledge the provision of ***a 401(k) benefit to bargaining union [sic.] employees in the drafting of the collective bargaining agreement***."(emphasis added) (R2) This language in the MOA is not an integrated expression of the parties' agreement with respect to terms of a 401(K): It is merely a

commitment to later record "a" 401(K) provision within the final CBA. What resulted in the final CBA was as follows:

> The Company 401K matching rate for all bargaining unit employees will be no less than 100% for each employee dollar contributed to individual accounts up to 5% maximum contribution. If during the term of the Agreement, the Company maximum contribution % is increased for non-represented, non bargained employees, the % shall also be increased for bargained employees.

(ALJD 8:17-18; GC 2, p. 133; GC 10-11). The earlier MOA by no means conflicted with or contradicted the subsequent CBA. The parties agreed that *a* 401(K) provision would be included in the final Agreement. A 401(K) provision *was* included in the final agreement. The final agreement was reviewed numerous times by the parties, including the 401(K) provision, over the course of several months. The parties ultimately executed the final agreement containing the 401(K) language at issue. CP had no reason to believe the language was included erroneously. Pluta testified to this effect. (TR 178; *see also* TR 143, 148) Her testimony is supported by the numerous drafts of the final CBA exchanged between the parties that were both drafted and reviewed by Respondent's attorneys. Pluta's testimony is also supported by Flagler, who testified that Halpern made a statement at the bargaining table to the effect of "six percent would be over the 5 percent ***for everyone*** right now." (emphasis added) (TR 123)

As such, the ALJ erred in concluding an earlier MOA supplanted the clear terms of the final CBA. Correspondingly, the ALJ erred in concluding that the Respondent was not bound by the terms of the 401(K) language contained in the final CBA.

C. *The ALJ Erred in Concluding That the Respondent Was Privileged to Deviate From the Terms of the Final CBA. (Exceptions 1-10)*

Based upon the conclusion that the earlier MOA supplanted the final CBA, the ALJ further concluded there was no unilateral change or midterm modification to the CBA. (ALJD 17: 28-33) To this end, the ALJ also relied upon parol evidence offered to show that the

Employer had historically only offered a 4.8% matching contribution. (ALJD 17: 33-42) The ALJ then concluded that Respondent, therefore, did not make any changes to the employees' terms and conditions of employment. (ALJD 18: 6-9)

The ALJ committed a compound error. First, as has been discussed *supra*, the parties' final agreement with respect to the 401(K) is expressed in a final CBA (GC2), not the earlier MOA (R2). Second, because the parties' final CBA contains the final expression with respect to the 401(K) matching formula, the Employer was not privileged to deviate from the terms of the CBA. *Knollwood Country Club*, 365 NLRB No. 22 slip op. at *8 (2017) (finding section 8(d) prohibits an employer from altering contractual terms concerning mandatory subjects of bargaining during the life of a collective bargaining agreement without the consent of the union.) The Respondent's past 401(K) matching formulas are irrelevant where the final negotiated CBA language is unambiguous, as is the case here.

IV. CONCLUSION

For all of the above-reasons the ALJ erred in her decision. Accordingly, the Board should overturn the ALJ's decision and issue an Order in accordance with the redress sought by CP and Counsel for the GC.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to the Board's Rules and Regulations the undersigned hereby certifies that a copy of the foregoing was filed electronically with the Division of Judges on August 17, 2020. A copy of the same was submitted to the following individuals via email the same day.

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